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# SHOULD THE *SPILIADA* TEST BE REVISED?

ARDAVAN ARZANDEH\*

## A. INTRODUCTION

It is now over 25 years since Lord Goff of Chieveley's leading speech in *Spiliada Maritime Corporation v Cansulex Ltd*,<sup>1</sup> a landmark House of Lords decision in which English law adopted the *forum (non) conveniens* doctrine. The approach in *Spiliada* to the practice of discretionary staying of proceedings, and the related concept of permission to serve out of the jurisdiction, was widely regarded as the final step in a long line of earlier judicial pronouncements.<sup>2</sup> In its immediate aftermath, the *Spiliada* test was largely welcomed within the legal community.<sup>3</sup> In his concurring speech in *Spiliada*, Lord Templeman held out the prospect that Lord Goff's formulation would enable judges to decide whether the court should exercise jurisdiction over the dispute swiftly and with minimum cost to the litigants.<sup>4</sup> In a law journal article, which was representative of the spirit in which the decision was received, Professor Pryles expressed the view that the decision in *Spiliada* had rendered the English approach to the *forum (non) conveniens* doctrine much more congruent with the

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<sup>1</sup> [1987] A.C. 460. Hereinafter, the phrases "the *Spiliada* doctrine" or "the *Spiliada* test" are used interchangeably to refer to the English *forum (non) conveniens* as defined in the *Spiliada* case. Discussions of the application of the English *forum (non) conveniens* doctrine refer to both: (a) disputes where a defendant is seeking to stay proceedings that have been brought against him during his presence in England (the so-called "as-of-right proceedings"); and, (b) proceedings where a claimant is applying to the court to serve the claim form on the defendant outside of jurisdiction (the so-called "service-out" cases).

<sup>2</sup> Before 1973, the relevant test based on which the English court would stay its as-of-right proceedings was known as the "vexatious-and-oppressive" test set out by Scott L.J. in *St Pierre v South American Stones (Gath & Chaves) Ltd* [1936] 1 K.B. 382 at 398. However, in *The Atlantic Star* [1974] A.C. 436, by a majority, the House of Lords ruled for the "liberalisation" of the vexatious-and-oppressive test. The liberalised test was subsequently replaced by a new test which was formulated in *MacShannon v Rockware Glass Ltd* [1978] A.C. 795. The *MacShannon* test remained relevant until it was departed from in *Spiliada*.

<sup>3</sup> See, e.g., A. Briggs, "Forum Non Conveniens – The Last Word? (*Spiliada Maritime Corporation v Cansulex Ltd*)" [1987] L.M.C.L.Q. 1.

<sup>4</sup> *Spiliada* [1987] A.C. 460 at 465.

interdependent world of the latter parts of the 20<sup>th</sup> century and respectful of the comity of nations.<sup>5</sup>

Nevertheless, the *Spiliada* test also had its critics. In a piece in the *Law Quarterly Review*, Professor Robertson claimed that, following the decision in *Spiliada*, the staying-of-proceedings practice in England had become subjected to a “judicial discretion so broad and so vaguely circumscribed as to amount to ‘an instinctive process’”.<sup>6</sup> This perception of the *Spiliada* doctrine also played a significant role in the refusal of the majority Justices in the High Court of Australia to adopt the *Spiliada* formulation in *Oceanic Sun Line Special Shipping Co Inc v Fay*.<sup>7</sup> In that case, Brennan J., who was the majority Justices’ most vehement critic of English law’s newly-adopted position, levelled the charge that “the English law [had] moved from a discretion confined by a tolerably precise principle [under *St Pierre v South American Stones (Gath & Chaves) Ltd*]<sup>8</sup> to a broad discretion”.<sup>9</sup>

At the time when these criticisms were being made, it might have been tempting to think that they would prove exaggerated and, thus, unfounded. However, as this article seeks to demonstrate, certain recent authorities have confirmed the misgivings foreshadowed by the doctrine’s early critics, particularly in relation to its unpredictable application. Moreover, these decisions highlight that, contrary to the views expressed by Lord Templeman and Professor Pryles, the application of the *Spiliada* doctrine leads to drawn-out and wasteful litigation and judicial chauvinism.

As this article goes on to demonstrate, the main source of these problems is the disproportionately broad discretion afforded to the court under the doctrine’s second limb. For both pragmatic and theoretical reasons, this article rejects arguments in favour of

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<sup>5</sup> M. Pryles, “Judicial Darkness on the Oceanic Sun” (1988) 62 A.L.J. 774.

<sup>6</sup> D.W. Robertson, “*Forum Non Conveniens* in America and England: ‘A Rather Fantastic Fiction’” (1987) 103 L.Q.R. 398 at 414 (citing Lord Wilberforce in *The Atlantic Star* [1974] A.C. 436 at 468).

<sup>7</sup> (1988) 165 C.L.R. 197 (Brennan, Deane and Gaudron JJ., Wilson and Toohey JJ. dissenting).

<sup>8</sup> [1936] 1 K.B. 382.

<sup>9</sup> (1988) 165 C.L.R. 197 at 238. Deane J. shared a similar reservation about the *Spiliada* doctrine: at 254.

maintaining the status quo. It also dismisses the view that the court's discretion under the doctrine's second limb should be completely discarded. Instead, this article argues for a middle way. In this respect, its key contribution is to provide a doctrinal framework with a view to limiting the court's room to manoeuvre at the second stage of the *Spiliada* test. More specifically, it argues that a fruitful doctrinal avenue resides in the context of the protection of a person's right to a fair trial under Article 6(1) of the European Convention on Human Rights (E.C.H.R.),<sup>10</sup> as applied in expulsion proceedings. Accordingly, the article's basic thesis is that, in both cases concerning service-out applications or staying of proceedings brought as of right, as a starting position, the English court should not exercise jurisdiction over a dispute which has been shown to be most closely connected to another available foreign forum. That position should be only departed from where the claimant can establish that sending the matter to its centre of gravity would render the United Kingdom in breach of its E.C.H.R. obligations, by virtue of the violation in that forum of the claimant's Article 6(1) rights (as defined in expulsion cases).

The main body of this article consists of four parts. The first part briefly outlines how the current *Spiliada* test is applied. The second part discusses some recent developments in this area which illustrate the breadth of the court's discretion under *Spiliada*'s second limb. The third part presents the arguments for departing from the current *Spiliada* test. The fourth part examines the possible reform models and offers a novel approach to a difficult conflict-of-laws problem.

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<sup>10</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

## B. THE APPLICATION OF THE *SPILIADA* TEST

It is well established when the *Spiliada* doctrine is applicable.<sup>11</sup> Subject to the Brussels Regime<sup>12</sup> and other express or implied statutory limitations,<sup>13</sup> the doctrine affords the English court a discretion to stay its proceedings, in a situation where the action has been brought in England as of right, if the court is persuaded that a foreign forum is more appropriate than the English court to decide the parties' dispute.<sup>14</sup>

Equally, it is well known that the *Spiliada* test is applied in two stages.<sup>15</sup> In cases concerning stays of as-of-right proceedings, at the first stage, the onus is on the defendant to convince the English court that there is some other available forum of competent jurisdiction which is more closely connected to the parties' dispute than England.<sup>16</sup> In other words, the defendant has to show that the court of a foreign country, which is the dispute's centre of gravity, would assume jurisdiction over it. In this respect, various factors are examined, with no single one being necessarily the decisive one. These considerations typically include the degree to which the parties and the events giving rise to their claim are connected with a

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<sup>11</sup> See Dicey, Morris and Collins: *The Conflict of Laws*, 15<sup>th</sup> edn (London: Sweet & Maxwell, 2012), r. 38(2) (para. 12R-001, pp. 533-534).

<sup>12</sup> In *Owusu v Jackson* [2005] (C-281/02) E.C.R. I-1383, the Court of Justice confirmed that the doctrine's scope of operation does not extend to those cases where the English court's jurisdiction derives from the Brussels Regime. The shorthand "Brussels Regime" covers provisions under "Brussels I Regulation" on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Reg. (E.C.) 44/2001, [2001] O.J. L 12/1 and the Lugano Convention (which extends rules virtually similar to those under the Brussels I Regulation to Iceland, Norway and Switzerland). From 10 January 2015, the Brussels I Regulation will be replaced by the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] O.J. L 351/1.

<sup>13</sup> E.g., where the English court's jurisdiction is based on the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929.

<sup>14</sup> The same test is also applied by the English court when deciding whether to serve proceedings on a defendant who is present outside England.

<sup>15</sup> See Dicey, Morris and Collins: *The Conflict of Laws*, 15<sup>th</sup> edn (London: Sweet & Maxwell, 2012), r. 38(2) (paras. 12-029-12-046, pp. 551-565); A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, 5<sup>th</sup> edn (London: Informa Law, 2009), para. [4.13], pp. 424-426; and Cheshire, North and Fawcett: *Private International Law*, 14<sup>th</sup> edn (Oxford: Oxford University Press, 2008), p. 428.

<sup>16</sup> *Spiliada* [1987] A.C. 460 at 476. For the sake of simplicity, in this article, the forum which is identified by the first stage of the *Spiliada* test is referred to as "the most closely connected forum". In service-out cases, the onus is on the claimant to persuade the English court that England is the forum which is most closely connected to the dispute.

particular country and also the system of law which governs the particular dispute in hand. Lastly, where relevant, in *lis alibi pendens* cases,<sup>17</sup> the court takes into account the fact that the parties before it are also involved in related proceedings against each other in another foreign forum.

If, after its inquiry under the first limb, the English court concludes that a foreign forum is more closely connected with the dispute than England, the second stage of the test becomes relevant. At this point, the claimant can seek to resist a stay on the basis that substantial justice would not be obtained in the most closely connected forum.<sup>18</sup>

To persuade the court that a stay should be refused at the second stage, the claimant can adduce evidence which points to examples of injustice being caused at virtually any stage in the court process in the most closely connected forum. The sorts of factors that the court can consider at this stage include “risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reasons, ... inexperience or inefficiency of the judiciary, ... excessive delay in the conduct of the business of the courts or the unavailability of appropriate remedies”.<sup>19</sup> Any allegations of this sort must be based on cogent evidence.<sup>20</sup> The stay application would be refused, if the claimant can satisfy the English court that his case would not be justly disposed of if it were sent to the available court in the most closely connected forum.

In order to see whether the discretion afforded to the English court under the *Spiliada* doctrine is in fact as vaguely defined as its critics have asserted, it is necessary to consider how it has been applied in practice. The court’s inquiries under the two limbs are different in focus and nature. Under the first limb, the court is effectively engaged in a fact-finding

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<sup>17</sup> These are cases where a dispute concerning related proceedings between similar parties, subject matter and cause of action is being litigated at the same time in England and a foreign forum.

<sup>18</sup> *Spiliada* [1987] A.C. 460 at 478.

<sup>19</sup> Lord Diplock in *The Abidin Daver* [1984] 1 A.C. 398 at 411.

<sup>20</sup> *Spiliada* [1987] A.C. 460 at 478.

analysis. At this stage, the test is pursuing two potential aims. The first is to avoid the litigation of transnational commercial disputes in England which are essentially unconnected to the forum. Second, in the context of *lis alibi pendens* cases, the first limb enables the English court to stay its proceedings, if it considers that the existence of the foreign proceedings, among other factors, makes the foreign court better placed to resolve the dispute. An assessment of the post-*Spiliada* case law suggests that, generally speaking, the first instance judges' findings under the doctrine's first limb have rarely been subjected to appeals. Furthermore, it is hard to identify academic discussions which have highlighted problems arising from the application of the court's discretion under the doctrine's first limb.<sup>21</sup> Accordingly, it is argued that, barring relatively few exceptions,<sup>22</sup> the court has applied its discretion under the *Spiliada*'s first limb fairly consistently. This consistency in approach, in turn, indicates that the court's discretion under this part of the doctrine has not been so vague as to render its application problematic.

The position is somewhat different with regards *Spiliada*'s second limb. At this stage, the doctrine aims to ensure that any potential injustice to the claimant in sending his claim to the most closely connected forum is avoided. In this respect, the court can consider almost any factor. Not all courts value, or give equal weight, the same factors. Therefore, the court's discretion is self-evidently much wider under *Spiliada*'s second limb than under its first limb.

Any potential for uncertainty in the application of the court's discretion under *Spiliada*'s second limb affects the predictability of the English doctrine as a whole. The reason for this observation is that the finding of injustice in the most closely connected forum under the doctrine's second limb can trump the finding under its first stage. Accordingly, it is

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<sup>21</sup> The only aspect of the first limb of *Spiliada* which has attracted academic discussion concerns the meaning of "availability" of the alternative foreign forum: see, e.g., A Briggs, "Forum non conveniens and unavailable courts" (1996) 67 B.Y.I.L. 587; L. Merrett, "The meaning of an 'available' forum" [2004] C.L.J. 309 and L. Merrett, "Uncertainties in the First Limb of the *Spiliada* test" (2005) 54 I.C.L.Q. 211.

<sup>22</sup> One such instance was the recent Supreme Court decision in *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 W.L.R. 398.

worth assessing whether the scope of the court's discretion under *Spiliada*'s second limb is in fact so broad as to justify the criticisms raised by Professor Robertson and the majority in the *Oceanic Sun* case. In making this assessment, due to limitations in time and space, it is not possible to consider every single case where the doctrine's second limb was applied. Hence, the next section focuses on a number of recent developments which are most likely to be of doctrinal significance.

### C. PROBLEMS WITH THE APPLICATION OF *SPILIADA*'S SECOND LIMB

#### 1. Recent Decisions

In the past five years or so, numerous cases concerning the *forum (non) conveniens* doctrine have been brought before the courts in England. Most of these decisions have simply reiterated Lord Goff's formulation in *Spiliada*. There have been, however, at least four cases which stand out: *Cherney v Deripaska*;<sup>23</sup> *OJSC Oil Company Yugraneft (in liquidation) v Abramovich*;<sup>24</sup> *Pacific International Sports Clubs Ltd v Soccer Marketing International Ltd*;<sup>25</sup> and, *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*.<sup>26</sup> These cases are important as they exemplify some serious problems with the application of the court's discretion under the *Spiliada* doctrine, particularly in the course of its analysis under the doctrine's second limb.

Although the facts of these cases are highly complex, they are not essential to this debate and are only briefly restated. In many respects, these cases were broadly similar: put simply, they concerned allegations by claimants that they had been defrauded by the defendants on a huge scale. In *Cherney*, the claimant, a businessman who had spent a large

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<sup>23</sup> [2008] EWHC 1530 (Comm); [2009] 1 All E.R. (Comm) 333. Affirmed by the Court of Appeal [2009] EWCA Civ 849; [2009] 2 C.L.C. 408.

<sup>24</sup> [2008] EWHC 2613 (Comm).

<sup>25</sup> [2009] EWHC 1839 (Ch). Affirmed by the Court of Appeal [2010] EWCA Civ 753.

<sup>26</sup> Also known as, *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 W.L.R. 1804.



part of his life doing business in Russia, applied to serve the defendant, a Russian resident, out of the jurisdiction. The claimant argued that, due to the defendant's wrongdoing, he had been deprived of his interest in a large Russian aluminium company. *OJSC* was also a service-out case in which the claimant complained that it had been defrauded of its interest in a large oil company by the foreign-based defendants. The substance of the dispute in *Pacific International* concerned the ownership of Dynamo Kiev Football Club. In proceedings brought in England against the defendants as of right, the claimants contended that the defendants had diluted their ownership in the football club. Lastly, in *Altimo Holdings*, a Manx case which was appealed to the Privy Council, the claimants sought to serve proceedings outside the Isle of Man. In that case, the ownership of a Kyrgyz mobile telephone company was at the heart of the parties' long-running dispute. In each of these cases, it was abundantly clear that England was not the most closely connected forum to the dispute. The most closely connected forum in each case was in a former Soviet state: Russia in *Cherney* and *OJSC*; Ukraine in *Pacific International* and Kyrgyzstan in *Altimo Holdings*. Hence, the outcome in each case hinged entirely on the application of *Spiliada*'s second limb.

In each of the cases, the claimants presented copious amounts of evidence in seeking to persuade the court that they would not receive a fair hearing in the most closely connected forum. In *Cherney*, the claimant argued that, if he went to Russia, his life would be in danger, he would face trumped up charges and he would not receive a fair hearing.<sup>27</sup> In *OJSC*, the claimant accused the Russian courts of "incompetence or corruption or both".<sup>28</sup> In *Pacific International*, the claimants alleged that Ukrainian courts "were susceptible to political pressure".<sup>29</sup> Moreover, they stated that their poor relationship with the Ukrainian establishment, and the way the Ukrainian court had decided their claim over the ownership of

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<sup>27</sup> [2008] EWHC 1530 (Comm); [2009] 1 All E.R. (Comm) 333 at [198].

<sup>28</sup> [2008] EWHC 2613 (Comm) at [491].

<sup>29</sup> [2009] EWHC 1839 (Ch) at [43].

the football club in recent proceedings, meant that their claim would not be justly disposed of in Ukraine.<sup>30</sup> Finally, in *Altimo Holdings*, the claimants pointed to their history of litigation in Kyrgyzstan in relation to the case in hand, contending that judgments against them in those proceedings had been obtained by fraud. Furthermore, they argued that there was a risk that they would not obtain a just disposal of their claim on the facts of the case.<sup>31</sup> In *Cherney* and *Altimo Holdings*, the court was persuaded by the claimants' arguments, while in *OJSC* and *Pacific International* it was not.

## 2. Problems Exposed in the Recent Decisions

Professor Briggs has been particularly critical of the decision in these cases.<sup>32</sup> His critique is specifically directed at the judgments in *Cherney* and *Altimo Holdings*. On one level, Professor Briggs criticised the readiness with which the English court accepted the claimants' disparaging submissions about the quality of justice provided in Russia and Kyrgyzstan. He noted that, it was "unprecedented" that, in a case where England was not the dispute's centre of gravity, "concerns about a foreign court doing real injustice" led to the *ex juris* service of the proceedings.<sup>33</sup> In relation to *Cherney*, Professor Briggs argued that, while Russia's legal system may not be without fault, the rule of law had not failed in Russia. He, therefore, questioned why the English court assumed jurisdiction over a dispute which was, to all intents and purposes, a Russian.<sup>34</sup> As for the decision in *Altimo Holdings*, Professor Briggs considered it "astonishing" that the English court upheld the Manx High Court's decision to

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<sup>30</sup> [2009] EWHC 1839 (Ch) at [43].

<sup>31</sup> [2011] UKPC 7; [2012] 1 W.L.R. 1804 at 1810 and 1816.

<sup>32</sup> See A. Briggs, "Russian oligarchs and the conflict of laws" (2008) 79 B.Y.I.L. 543; A. Briggs, "Forum non satis: finding fault with a foreign court" (2009) 80 B.Y.I.L. 575; A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, 5<sup>th</sup> edn (London: Informa Law, 2009), para. [4.29], pp. 446-448; and, A. Briggs, "Forum Non Satis: *Spiliada* and an Inconvenient Truth" [2011] L.M.C.L.Q. 329.

<sup>33</sup> A. Briggs, "Forum Non Satis: *Spiliada* and an Inconvenient Truth" [2011] L.M.C.L.Q. 329 at 331.

<sup>34</sup> A. Briggs, "Russian oligarchs and the conflict of laws" (2008) 79 B.Y.I.L. 543 at 547.

serve proceedings on defendants outside the jurisdiction because there was a “risk”<sup>35</sup> that the claimants would not obtain justice in courts in Kyrgyzstan.<sup>36</sup>

On another level, and more generally, Professor Briggs has expressed misgivings about the future implications that the decisions in *Cherney* and *Altimo Holdings* are likely to lead to.<sup>37</sup> *Cherney* and *Altimo Holdings* are weighty authorities: they had been handed down by the Court of Appeal and the Privy Council, respectively. According to Professor Briggs, these decisions would invite claimants, whether in cases concerning service-out applications or staying of proceedings brought as of right, to make submissions questioning the ability of the more closely connected foreign court to decide their claims justly.<sup>38</sup>

It remains to be seen whether Professor Briggs’s predictions about the likely consequence of the judgments in *Cherney* and *Altimo Holdings* will in fact materialise.<sup>39</sup> More immediately, though, the study of these decisions exposes at least three broader (and more pressing) problems with the application of the second limb of the *Spiliada* test.

The first problem is that the *Spiliada* doctrine is open to the charge that it leads to unpredictable outcomes. In any given case, it is very difficult to know, with reasonable certainty, in whose favour the second limb of the *Spiliada* test is likely to be applied. As stated earlier, the issues for consideration in each of the four cases considered in this section were not wildly different from one another: the claimants’ basic argument was that the defendants had unjustifiably interfered with their proprietary interests. It was, therefore, reasonable to anticipate that the application of the *Spiliada*’s second limb in each of these cases would lead to the same result. Yet, that did not happen. Consider, for example, the

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<sup>35</sup> [2011] UKPC 7; [2012] 1 W.L.R. 1804 at 1840-1841.

<sup>36</sup> A. Briggs, “Forum Non Satis: *Spiliada* and an Inconvenient Truth” [2011] L.M.C.L.Q. 329.

<sup>37</sup> A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, 5<sup>th</sup> edn (London: Informa Law, 2009), para. [4.29], p. 448 and A. Briggs, “Forum Non Satis: *Spiliada* and an Inconvenient Truth” [2011] L.M.C.L.Q. 329 at 330, 332-333.

<sup>38</sup> A. Briggs, “Forum Non Satis: *Spiliada* and an Inconvenient Truth” [2011] L.M.C.L.Q. 329 at 333.

<sup>39</sup> In the period following the decisions in *Cherney* and *Altimo Holdings*, there has not been any reported case in which the court has chosen to sustain or commence English proceedings following disparaging comments about the quality of justice in the dispute’s centre of gravity.

decisions in *Pacific International* and *Altimo Holdings*. In both cases, the claimants in the English proceedings argued that in earlier court hearings, concerning similar issues as those before the English courts, the Ukrainian and Kyrgyz courts' judgments against them had been fraudulently obtained. This assertion was not dismissed by the court in *Pacific International*, while it was one of the main reasons for the Privy Council's ruling in *Altimo Holdings* that England was *forum conveniens*. This state of affairs can hardly be desirable. It supports Professor Robertson's claim that, under a doctrine like *Spiliada*, "seemingly indistinguishable cases have far too often yielded diametrically opposite results".<sup>40</sup>

The second problem associated with the application of the *Spiliada* doctrine is linked to the first: the doctrine's application is resource-inefficient. As pointed out earlier, the application of the *Spiliada* test is fact specific. Additionally, when the court is applying the test's second limb, almost any factor can be taken into consideration. Consequently, the court has to contend with a sizeable volume of evidence. In turn, this evidential burden further complicates and lengthens the hearing on where the dispute should be litigated. In *OJSC*, for example, nearly half of an eight-day trial period involved submissions about whether the Russian court could justly dispose of the parties' dispute. In *Pacific International*, a little over half of a six-day hearing, at first instance, and the whole of a two-day hearing, before the Court of Appeal, were devoted to the discussion of whether the claimant could receive justice if the case were to be stayed in favour of Ukraine. The hearing bundles in *Pacific International*, at first instance and on appeal contained approximately 8,000 and 1,500 pages of documents, respectively. The fact that this level of evidential assessment has dominated litigation on the jurisdiction question in these cases is also reflected in the courts' judgments. For example, the first instance judges in *Cherney*<sup>41</sup> and *Pacific International*,<sup>42</sup> spent over 60

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<sup>40</sup> D.W. Robertson, "Forum Non Conveniens in America and England: 'A Rather Fantastic Fiction'" (1987) 103 L.Q.R. 398 at 415.

<sup>41</sup> [2008] EWHC 1530 (Comm); [2009] 1 All E.R. (Comm) 333 at [197]-[263] (Christopher Clark J.).

paragraphs examining the (in)ability of the courts in the most closely connected forums to dispose of the parties' disputes justly. The following passage in Lord Collins of Mapesbury's judgment in *Altimo Holdings*, is also telling

"this case has been excessively complicated by any standards. The hearings before the deemster and the Staff of Government Division each lasted for four days or more. The hearing before the Board lasted four days. The written cases of the parties exceeded 200 pages, and more than 30 volumes of documents were placed before the Board, containing almost 14,000 pages, as well as 170 authorities in 12 volumes. The core bundle alone consisted of six volumes. The list of "essential" pre-reading for the Board listed documents totalling some 700 pages. All of this was wholly disproportionate to the issues of law and fact raised by the parties."<sup>43</sup>

This state of affairs is no doubt lucrative for the English legal profession and, in any event, the English court has rarely shown displeasure in allocating time and resources to the litigation of disputes that have very little (if any) connection with England.<sup>44</sup> Nevertheless, it is hardly appropriate that the current doctrinal framework for *Spiliada*, particularly in relation to its second limb, lends itself to being the source for wasteful litigation in England. When *Spiliada* was decided, Lord Templeman had hoped that a judge would be able to apply Lord Goff's basic principle in *Spiliada* to the case before him "in the quiet of his room without expense to the parties .... and that submissions [would] be measured in hours and not days".<sup>45</sup>

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<sup>42</sup> [2009] EWHC 1839 (Ch) at [35]-[99] (Blackbourne J.).

<sup>43</sup> [2011] UKPC 7; [2012] 1 W.L.R. 1804 at 1808.

<sup>44</sup> Perhaps the most extreme pronouncement of the English court's readiness to be involved in deciding international commercial disputes, notwithstanding their lack of connection with England, was that of Lord Denning M.R. in *The Atlantic Star* [1973] Q.B. 364 at 382, where he stated that "this right to come [to England for litigation] is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum-shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service." Contrast the position in the United States (particularly courts in New York), where the problem of court dockets congested with "alien disputes" was a catalyst in the development of the practice of discretionary staying of proceedings: see, e.g., P. Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law" (1929) 29 Colum. L. Rev. 1.

<sup>45</sup> [1987] A.C. 460 at 465.

This statement may have been made more in hope rather than in expectation. Nonetheless, in its current form, the *Spiliada* doctrine does not make it any easier to realise Lord Templeman's expectation (or aspiration).

The third problem with the existing *Spiliada* test is that it can lead to judicial chauvinism. The fact that the *St Pierre* test encouraged the English court to consider itself better placed in addressing international commercial disputes, than courts of foreign countries, was one of the main reasons for the law's gradual refinement and the ultimate adoption of the *Spiliada* doctrine. The following passage in Lord Diplock's speech in *The Abidin Dayer*, stated not long before the *Spiliada* test was formulated of, emphasises that, in the eyes of the English court, the departure from the *St Pierre* formula had marked the end of judicial chauvinism in this area of the law

“the essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions that has been achieved step-by-step during the last 10 years as a result of the successive decisions of this House in *The Atlantic Star*, *MacShannon v Rockware Glass Ltd* and *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* is that judicial chauvinism has been replaced by judicial comity”.<sup>46</sup>

However, an assessment of the recent case law casts doubt on the idea that the *Spiliada* doctrine has closed the door to judicial chauvinism. The potentially wide range of factors that can be considered under the doctrine's second limb means that, inescapably, the English court may become engaged in what is akin to a forensic examination of the (in)ability of the court in the dispute's centre of gravity to dispose justly of the claimant's claim. In other words, the second limb of *Spiliada* effectively allows it to be used as a conduit for the English court to call into question the quality of justice likely to be delivered by a foreign

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<sup>46</sup> [1984] 1 A.C. 398 at 411 (citations omitted).

legal system. This problem was particularly evident in the four cases discussed, where the parties advanced copious amounts of evidence to establish that the Russian, Ukrainian and Kyrgyz courts were (un)able justly to resolve the disputes involved. The fact that the doctrine's second limb draws the English court into such an inquiry is undesirable in as much as it encourages judicial chauvinism.<sup>47</sup>

### 3. Similar Problems in Earlier Decisions

Significantly, the shortcomings arising from the broad-brush discretion afforded to the English court under the second limb of the *Spiliada* doctrine are not novel developments and have existed ever since its formulation. Moreover, they are not confined to cases where the claimant has sought to cast doubt on the integrity of a foreign legal system which is closely connected to the parties' dispute. Indeed, these problems may be detected in a wider range of cases decided since the *Spiliada* test was outlined.<sup>48</sup> For our purposes, it will suffice to consider examples in one other type of case.

This class involves cases where the allegation is that the forum most closely connected to the dispute lacks the necessary resources or expertise to entertain the matter. In this context, one noteworthy example is *Lubbe v Cape*.<sup>49</sup> In this case, a set of plaintiff miners brought group litigation against their employers' parent companies, which were domiciled in England,<sup>50</sup> seeking compensation for contracting terminal illnesses as a result of exposure to toxic material while working at their mines in South Africa. There was little doubt that South

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<sup>47</sup> See, also, A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, 5<sup>th</sup> edn (London: Informa Law, 2009), at para. [4.29], p. 448 and A. Briggs, "Forum Non Satis: *Spiliada* and an Inconvenient Truth" [2011] L.M.C.L.Q. 329 at 331.

<sup>48</sup> For a discussion about the same problems as those identified in this section (and also some others), see J. Hill, "Jurisdiction in Civil and Commercial Matters: Is There a Third Way?" [2001] C.L.P. 439 at 449-454.

<sup>49</sup> [2000] 1 W.L.R. 1545. See, also, the decision in *Connelly v RTZ Corporation* [1998] A.C. 854 which highlights, more or less, similar problems with the *Spiliada* doctrine's application.

<sup>50</sup> It should be noted that, following the Court of Justice's decision in *Owusu v Jackson* [2005] (C-281/02) E.C.R. I-1383, in a case like *Lubbe*, there would have been no question the English court could not stay its proceedings on the grounds that it was *forum non conveniens*.

Africa was the dispute's centre of gravity. The bulk of the discussion in *Lubbe*, therefore, focused on the application of *Spiliada*'s second limb. The plaintiffs argued that they would not receive justice if their claim were sent to South Africa because, due to lack of legal-aid provisions there, they could not afford to bring their claim. Additionally, the plaintiffs stated that the South African legal system was not experienced enough to entertain a large-scale dispute like the one in that case – which had involved claims by more than 3,000 litigants. The litigation in *Lubbe* was appealed all the way to the House of Lords which unanimously admitted the plaintiffs' submissions and ruled that the proceedings in England should not be stayed.

The same problems with the application of the doctrine's second limb as those identified in some of the recent decisions can be detected in *Lubbe*. In the first place, the way in which the *Lubbe* litigation unfolded best exemplifies how unpredictable the application of the doctrine's second limb can be. In that case, the court had entertained the dispute in two rounds of litigation. In the first round, the court of first instance had ordered for the English proceedings to be stayed, but that decision was reversed on the plaintiff's appeal.<sup>51</sup> Thereafter, a second round of litigation was commenced, supplanting the first-round hearing. In the second set of proceedings, the plaintiffs' arguments had been rejected both at first instance<sup>52</sup> and the Court of Appeal.<sup>53</sup> A unanimous House of Lords, however, hearing the claims on broadly the same body of evidence, admitted the plaintiffs' submissions and ruled that the English proceedings should not be stayed. Moreover, the decision in *Lubbe* emphasises the propensity in the doctrine's application to result in drawn-out and resource-inefficient litigation.<sup>54</sup> Even a cursory glance at the submissions and the speeches in this case

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<sup>51</sup> [1998] C.L.C. 1559.

<sup>52</sup> Judgment of 30 July 1999 (unreported).

<sup>53</sup> [2000] C.L.C. 45.

<sup>54</sup> See J. Hill, "Jurisdiction in Civil and Commercial Matters: Is There a Third Way?" [2001] C.L.P. 439 at 449-450.



is enough for one to appreciate the extensiveness of materials presented at all stages of the litigation.<sup>55</sup> Finally, the House of Lords' reasoning in *Lubbe* was effectively a lengthy and forensic appraisal of the (in)capabilities of the courts and processes in the legal system of a friendly foreign state, with the ultimate conclusion that the South African legal system could not cope with the complicated nature of the claims involved. This state of affairs illustrates that, even after the pronouncement of the *Spiliada* test, the English *forum (non) conveniens* doctrine has continued to allow for judicially chauvinistic decisions to be made.

These shortcomings, in turn, signify that the court's discretion under *Spiliada*'s second limb is indeed disproportionately broad. Consequently, the recent developments in the case law justify much of the criticism levelled by Professor Robertson and the majority Justices in the *Oceanic Sun* case about the ambit of the discretion afforded to the English court under the *Spiliada* doctrine.

#### **D. THE CASE FOR REVISING *SPILIADA*'S SECOND LIMB**

Notwithstanding these problems arising from the court's broad-brush discretion under *Spiliada*'s second limb, it might nevertheless be argued that the case for its revision is not pressing. Following the Court of Justice's decision in *Owusu v Jackson*,<sup>56</sup> there are more limited instances where the *Spiliada* doctrine could be applied because the English court cannot stay its proceedings in a dispute where the defendant is domiciled in England. Hence, the problems highlighted in a case like *Lubbe* will no longer arise because the English court will have no discretion whether to exercise jurisdiction over the dispute.<sup>57</sup>

Be that as it may, there are both pragmatic and theoretical arguments in favour of revisiting the current doctrinal basis for the operation of *Spiliada*'s second limb.

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<sup>55</sup> The abundance of the evidence before the courts did not go unnoticed by Lord Bingham of Cornhill: [2000] 1 W.L.R. 1545 at 1557.

<sup>56</sup> [2005] (C-281/02) E.C.R. I-1383.

<sup>57</sup> This observation would similarly apply in so far as the *Connelly* case is concerned.

Pragmatically speaking, at least two reasons in favour of reform can be advanced. First, the problems highlighted in cases like *Lubbe* could still arise in the context of service-out cases. As noted by Professor Briggs, following the English court's decisions in *Cherney* and *Altimo Holdings*, the alleged inability of the court most closely connected to the dispute to do justice in the case involved can be sufficient to persuade the English court to give permission for service of process *ex juris*, notwithstanding that England is not the dispute's centre of gravity.<sup>58</sup> In other words, although since *Owusu* the likelihood of problems arising with the application of *Spiliada*'s second limb has become more curtailed in proceedings that have been brought against an English domiciliary in England as of right, there is plenty of scope for these problems to arise in service-out cases.

The second, arguably more pressing, pragmatic reason for reforming the law in this area arises mainly as a result of the changing nature of international commercial litigation. Over the last two decades, there has been a sharp increase in global trade with countries that are often collectively labelled as the "emerging market economies".<sup>59</sup> In this respect, two causes have been particularly important. One has been the general liberalisation of economic policies in those countries. This move has, in turn, opened up those markets to increased levels of international trade and investment. A useful example for this development is the denationalisation of industries after the collapse of the Soviet Union which generated large-scale business opportunities in these emerging market economies. The other cause has been the credit crunch in 2007 and the ensuing global financial crisis in 2008. These events have, to this day, shackled the Western economies. In their attempts to bounce back, they have sought to expand their trade and business links with the emerging market economies which have largely weathered the storm caused by the global financial crisis. The current trends

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<sup>58</sup> A. Briggs, "Forum Non Satis: *Spiliada* and an Inconvenient Truth" [2011] L.M.C.L.Q. 329.

<sup>59</sup> It appears that this term does not characterise a specific group of countries. Nevertheless, it is widely (and loosely) regarded as defining the economies in those countries that are undergoing rapid social and economic modernisation.

indicate that, at least for the foreseeable future, much of the large and complex international business transactions are going to be very closely linked to these emerging market economies. It follows that the English court is likely to face an increasing number of international commercial disputes with strong connections with emerging markets. Many of these nations have only just begun the arduous process of social, political and economic modernisation. Their legal systems are also undergoing a process of development. When judged against the standards of the so-called “developed nations”, these legal systems may not be as independent, resourceful and experienced in resolving international commercial disputes. It is, therefore, conceivable that in many of those cases, the claimants in the English proceedings would be predominantly reliant on *Spiliada*’s second limb, by pointing to inadequacies or limitations in the legal systems within the emerging markets as the sole basis for keeping (or commencing) the proceedings in England.

Aside from the pragmatic reasons discussed above for departing from the status quo, an argument can also be made at an abstract level. The common law jurisdiction rules can be problematic in at least two respects. First, they can enable the English court to assume jurisdiction over an international commercial dispute with which it has very little (or no) connection. Second, they can afford the English court adjudicatory competence in the context of a *lis alibi pendens* case, thereby increasing the risk of irreconcilable judgments in the English and foreign forums. *Spiliada*’s first limb seeks to address these potential shortcomings with the common law jurisdiction rules. At the same time, pursuant to *Spiliada*’s second limb, the avoidance of these problems is subject to the claimant not being deprived of the right to have a just disposal of his case. If it is accepted that the scope of the court’s discretion under *Spiliada*’s second limb is disproportionately broad, then it is questionable whether the right balance can be struck between the competing aims of under the doctrine’s first and second limbs. More significantly, and in view of the fact that

*Spiliada*'s second limb can trump its first, there is a real risk that the important role played by the doctrine's first limb can be undermined. Consequently, the very problems for which the first limb has been formulated to remedy would remain unresolved. For this, and the other pragmatic reasons, it is argued that *Spiliada*'s second limb should be revised.

## **E. WHERE SHOULD WE GO FROM HERE?**

So far, this article has sought to argue that, the discretion available to the court in applying *Spiliada*'s second limb has in fact been broad and has given rise to numerous problems. This section identifies and examines potential ways to improve on the status quo.

One obvious way of circumventing the shortcomings arising from the application of the *Spiliada* doctrine (along with other potential imperfections) is to overhaul the common law jurisdiction rules.<sup>60</sup> These rules allow the court to assume jurisdiction over disputes with which it has virtually no connection. Any limitation of the grounds for the English court's assumption of jurisdiction over an international commercial dispute would, in turn, result in a much more reduced need for a doctrine like *forum (non) conveniens*. In practice, though, it is ambitious to think that there is any realistic prospect for such a wholesale change. Instead, a more fruitful line of inquiry would be to focus on redefining the *Spiliada* doctrine's second limb by limiting the scope of the court's discretion. In this respect, the main task is to identify the doctrinal avenue through which to make this change.

### **1. Should *Spiliada*'s Second Limb be Completely Abolished?**

One (and perhaps the most extreme) way of confining the English court's discretion under the doctrine's second limb is to discard it completely. Based on this approach, all that would have to be shown is that a foreign forum has a closer connection with the parties' dispute than

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<sup>60</sup> For an argument along these lines see J. Hill, "Jurisdiction in Civil and Commercial Matters: Is There a Third Way?" [2001] C.L.P. 439.

the English court and that this forum is competent to entertain the dispute. This model broadly resembles the *forum non conveniens* doctrine in Scotland before the *Spiliada* test was formulated in 1986.<sup>61</sup>

Shortly after the pronouncement of the *Spiliada* doctrine, certain commentators suggested that Lord Goff had simply replaced the existing approach in England with the Scottish doctrine.<sup>62</sup> This view is not entirely accurate, however. Although Scottish case law and commentary influenced Lord Goff's articulation of the *Spiliada* test,<sup>63</sup> there were notable differences between the two jurisdictions' approaches to the discretionary staying of proceedings.

The study of Scottish case law indicates that, from before the House of Lords' endorsement of the doctrine in Scotland in *Société de Gaz de Paris v Société Anonyme de Navigation "Les Armateurs Français"* in 1925,<sup>64</sup> until the *Spiliada* decision,<sup>65</sup> the Scottish *forum non conveniens* doctrine had been applied as a one-stage test.<sup>66</sup> Under the Scottish test,

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<sup>61</sup> After its adoption in England, the *Spiliada* doctrine has supplanted the pre-existing position in Scotland: see, e.g., the Scottish court's decisions in *Sokha v Secretary of State for the Home Department* [1992] S.L.T. 1049; *PTKF Kontinent v VMPTO Progress* [1994] S.L.T. 235 and *Royal Bank of Scotland v Davidson* [2009] CSOH 134; [2010] S.L.T. 92.

<sup>62</sup> See, e.g., J.G. Collier, "Staying of Actions and Forum Non Conveniens. English Law goes Scotch" [1987] 46 C.L.J. 33, E. Blackburn, "Lis alibi pendens and forum non conveniens in collision actions after the Civil Jurisdiction and Judgments Act 1982" [1988] L.M.C.L.Q. 91 and M. Pryles, "Forum Non Conveniens – the Next Chapter" (1991) 65 A.L.J. 442.

<sup>63</sup> Most notably, he relied on the Scottish decisions in *Sim v Robinow* (1892) 19 R. 665 and *Société de Gaz de Paris v Société Anonyme de Navigation "Les Armateurs Français"* [1926] S.C. 13 and the analysis in A.E. Anton, *Private International Law*, 1<sup>st</sup> edn (Edinburgh: W. Green & Son Ltd, 1967).

<sup>64</sup> [1926] S.C. 13. See, e.g., *David Fairweather and Others (Adamson's Trustees) v Mactagart* (1893) 1 S.L.T. 41; *Hine v MacDowall* (1897) 5 S.L.T. 12; *M'Lachlin v London and North-Western Railway Co* (1899) 7 S.L.T. 244; *Powell v Mackenzie & Co* (1900) 8 S.L.T. 182; *Lane v Foulds* (1903) 11 S.L.T. 118; *Gemmell v Emery* (1905) 13 S.L.T. 490; *Anderson, Tulloch & Co v JC & J Field* (1910) 1 S.L.T. 401; *James Howden & Co Ltd v Powell Duffryn Steam Coal Co Ltd* (1912) 1 S.L.T. 114; *Rothfield v Cohen* (1919) 1 S.L.T. 138; and, *French v Hohback* (1921) 2 S.L.T. 53.

<sup>65</sup> See, e.g., *Lawford v Lawford's Trustees* [1927] S.C. 360; *Robinson v Robinson's Trustees* [1929] S.C. 360 (overturned in *Robinson v Robinson's Trustees* [1930] S.C.(H.L.) 20); *Owners of SS "Sheaf Lance" v Owners of SS "Barcelo"* [1930] S.L.T. 445; *Woodbury v Sutherland's Trustees* [1938] S.L.T. 371; *Woodbury v Sutherland's Trustees* [1938] S.C. 689; *McLean v McLean* [1947] S.C. 79; *Jubert v Church Commissioners for England* [1952] S.C. 160; *Babington v Babington* [1955] S.C. 115; *Argyllshire Weavers Ltd v A. Macaulay (Tweeds) Ltd* [1962] S.C. 388; *Balshaw v Kelly (otherwise Balshaw)* [1966] S.L.T. 297; *Balshaw v Balshaw* [1967] S.C. 63; *Credit Chimique v James Scott Engineering Group Ltd* [1979] S.C. 406.

<sup>66</sup> See Lord Jauncey's statement in *Credit Chimique v James Scott Engineering Group Ltd* [1979] S.C. 406 at 410, where he summarised the position in Scottish law on the application of the *forum non conveniens* doctrine as follows: "(1) ... the burden of satisfying the tribunal that the case submitted to it for decision should not be

the court would stay its proceedings if doing so were “in the interests of all the parties and the ends of justice.”<sup>67</sup> In this context, the conception of justice in Scotland was considerably different from that widely understood in England under the *Spiliada* doctrine. There have been no reported cases in which, after enquiring and concluding that a foreign forum is the one most closely connected to the dispute, the Scottish court has asked itself whether justice would be done in that forum. The analysis of commentators also reflects this understanding of the Scottish case law.<sup>68</sup> The Scots’ position was that, if a foreign forum was the dispute’s centre of gravity that forum could justly dispose of the parties’ dispute.

There are obvious advantages to discarding *Spiliada*’s second limb. It would greatly simplify the doctrine’s application: establishing the forum to which, for all intents and purposes, the litigation belongs would become the court’s only preoccupation. As a result, the problems arising from the court’s broad discretion under *Spiliada*’s second limb would be avoided. Indeed, in so far as service-out cases are concerned, Professor Briggs favours an interpretation of the *Spiliada* test which focuses only on finding the forum most closely connected to the dispute.<sup>69</sup>

Nevertheless, the abolition of *Spiliada*’s second limb would be a disproportionate response to the existing problems. In the overwhelming majority of the Scottish *forum non conveniens* cases, England was the dispute’s centre of gravity. In those cases, virtually all the

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allowed to proceed lie[d] upon the defender who table[d] the plea; (2) ... this burden [could] only be discharged where weighty reasons [have been advanced] why an admitted jurisdiction should not be exercised, mere balance of inconvenience being insufficient; (3) ... there [was] another court of competent jurisdiction in which the matter in question [could] be litigated; and (4) ... considerations of these reasons [led] to the conclusion that the interests of the parties [could] more appropriately be served and the ends of justice [could] more appropriately be secured in that other court”.

<sup>67</sup> Lord Kinnear in *Sim v Robinow* (1892) 19 R. 665 at 668.

<sup>68</sup> See, e.g., A.E. Anton, *Private International Law*, 1<sup>st</sup> edn (Edinburgh: W. Green & Son Ltd, 1967), pp. 148-154 and A.E. Anton and P.R. Beaumont, *Private International Law*, 2<sup>nd</sup> edn (Edinburgh: W. Green & Son Ltd, 1990), pp. 212-218.

<sup>69</sup> According to Professor Briggs “if England is not [the most closely connected forum], ..., service out of the jurisdiction will not be authorised, even if the foreign court is not much good”: A. Briggs, “Forum Non Satis: *Spiliada* and an Inconvenient Truth” [2011] L.M.C.L.Q. 329 at 333. See, also, A. Briggs, “*Forum non satis*: finding fault with a foreign court” (2009) 80 B.Y.I.L. 575 at 578.

arguments focused on identifying the venue with which the dispute was connected. The Scottish court hardly ever had to address a situation in which the ability of the more closely connected forum to do justice to the parties was under the slightest doubt. Indeed, if it had routinely encountered submissions that the more closely connected forum could not justly deal with the parties' dispute, the Scottish court may have been forced to develop a more nuanced conception of "justice" in the *forum non conveniens* context. More significantly, without its second limb, the English court would have to grant a stay of its proceedings in favour of the more closely connected forum (or refuse the service-out application), notwithstanding that doing so could subject the claimant to the gravest forms of injustice in the dispute's centre of gravity. Such extreme instances of injustice to the claimant could include cases where the legal system of the more closely connected forum would discriminate against the claimant on racial,<sup>70</sup> religious<sup>71</sup> or political<sup>72</sup> grounds, or where there has been a complete breakdown in the rule of law in that forum.<sup>73</sup> For these reasons, there is little merit in discarding completely *Spiliada*'s second limb.

A more prudent course of action would be to refine the *Spiliada* doctrine with a view to limiting (rather than completely abolishing) the court's room to manoeuvre at the second stage. One point is worth mentioning at this stage. In redefining the scope of the discretion accorded to the English court under *Spiliada*'s second limb, the objective is not to remove

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<sup>70</sup> An example could be where, during the rule of the Apartheid regime in South Africa, the English court would have had to send there a Black South African's case (that was most closely connected to South Africa).

<sup>71</sup> See, e.g., *Oppenheimer v Louis Rosenthal & Co AG* [1937] 1 All E.R. 23, a service-out case involving a German Jewish plaintiff seeking to sue his German employer in England. Despite the overwhelming connection between the claim and Germany, order was granted in the plaintiff's favour. It was almost certain that the plaintiff would not receive a fair hearing if the matter was remitted to the Nazi-ruled Germany and could well have been arrested and persecuted. Another similar example, albeit in a different context, is *Ellinger v Guinness, Mahon & Co* [1939] 4 All E.R. 16. In this case, despite the existence of an exclusive jurisdiction clause in favour of the German court, the Jewish plaintiff sought to pursue his claim in England, fearing persecution by the Nazi regime.

<sup>72</sup> See, e.g., *Carvalho v Hull Blyth (Angola) Ltd* [1979] 1 W.L.R. 1228 (where, the Portuguese plaintiff brought an action in England notwithstanding the Angolan exclusive jurisdiction clause. He argued that, in light of the Angolan revolution against the Portuguese rule, his claim would not be entertained justly).

<sup>73</sup> See, e.g., *Alberta Inc v Katanga Mining Ltd* [2008] EWHC 2679; [2009] 1 B.C.L.C. 189.

from the court any scope for discretion and to, in effect, codify this aspect of the doctrine. Instead, the aim is to afford the court a more narrowly-circumscribed discretion which would help to reduce the scope for problems arising with the application of the doctrine's second limb.

## **2. Article 6(1) of the E.C.H.R. (as applied in expulsion cases) as the basis for refining *Spiliada*'s second limb**

In searching for a way to curtail the scope of the court's discretion under *Spiliada*'s second limb, one possibly fruitful doctrinal avenue is that which underpins the protection of a person's right to a fair trial under Article 6(1) of the E.C.H.R., when that person is being subjected to expulsion proceedings in England.

Article 6(1) provides that, "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." An E.C.H.R. signatory state is obliged to protect the Article 6(1) rights of those within its jurisdiction in two broad types of instance.<sup>74</sup> One concerns the so-called "domestic cases", where the signatory state must ensure that its conduct within its own territory does not infringe the rights enshrined under Article 6(1) of those present within its jurisdiction.<sup>75</sup> The other relates to deportation or extradition proceedings. In such a case, the signatory state has to ensure that the removal of the individual in question to the other state – which may (or may not) be a Convention state – would not lead to the violation in the receiving state of the individual's Article 6(1) rights.<sup>76</sup> In other words, the signatory state would fall foul of its E.C.H.R.

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<sup>74</sup> It is notable that these obligations on the part of a signatory state apply in relation to all other rights within the E.C.H.R..

<sup>75</sup> Lord Bingham in *R. (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323 at 340.

<sup>76</sup> This aspect of a signatory state's E.C.H.R. obligations also applies in relation to other Convention rights: see, e.g., *R. (Ullah)* [2004] UKHL 26; [2004] 2 A.C. 323 (concerning the prospective deportee's Article 3 rights); *E.M. (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64; [2009] 1 A.C. 1198



obligations if the Article 6(1) rights of the individual in question would be breached if he is deported to the receiving state.

Evidently, the expulsion and *forum (non) conveniens* cases are not exactly alike. In the former group of cases the question is whether the English court should expel a *person* to another forum. In the latter category of cases, however, the main issue is whether the *dispute* should be sent to a foreign forum. Nevertheless, it is argued that these types of case are analogous.<sup>77</sup> In both instances, the court is effectively concerned with whether the person would be subjected to injustice if he (in expulsion cases) or his claim (in *forum (non) conveniens* cases) is removed to a foreign state. In view of this analogy, it is useful to identify the doctrinal avenue through which the court ensures that individuals' Article 6(1) rights are protected in expulsion cases. This examination sheds light on how (in)justice in the receiving state is defined in the context of those cases and whether this conception could be transplanted as the doctrinal basis for applying *Spiliada*'s second limb.

In expulsion cases, removal of an individual from a contracting state would only amount to a breach of his Article 6(1) rights if there is a real risk of "a flagrant denial of justice" in the receiving country of the deportee's right to fair trial.<sup>78</sup> Neither the case law nor the literature contains a conclusive definition of what amounts to a real risk of a flagrant denial of justice. Nonetheless, there have been various pronouncements that have tried to

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(concerning the prospective deportee's Article 8 rights). For more discussion about the signatory state's obligations arising in the context of expulsion cases see, *inter alia*, *Soering v United Kingdom* (Application No. 14038/88) (1989) 11 E.H.R.R. 439, *Drozdz v France* (Application No. 12747/87) (1992) 14 E.H.R.R. 745 and *Mamatkulov and Askarov v Turkey* (Applications nos 46827/99 and 46951/99) (2005) 41 E.H.R.R. 494.

<sup>77</sup> See, also, J.J. Fawcett, "The Impact of Article 6(1) of the ECHR on Private International Law" (2007) 56 I.C.L.Q. 1 at 4.

<sup>78</sup> *Soering* (1989) 11 E.H.R.R. 439 at [113], *Einhorn v France* Reports of Judgments and Decisions 2001-XI at [32]-[33]; *Tomic v United Kingdom* (Application No 17837/03) Judgment of 14 October 2003 (unreported) at [3]; *Mamatkulov and Askarov* (2005) 41 E.H.R.R. 494 at [90]; *Al-Saadoon v United Kingdom* (Application no. 61498/08) (2010) 51 E.H.R.R. 9 at [149] and *Othman v United Kingdom* (Application No.8139/09) (2012) 55 E.H.R.R. 1 at [258]. If it is concluded that there is a real risk of flagrant denial of justice in the receiving state, then the individual's deportation would amount to a breach of the contracting state's E.C.H.R. obligations, unless the deporting country is given sufficient diplomatic assurances that the individual would not be subjected to such injustice.

make sense of it. For example, in *Mamatkulov and Askarov v Turkey*, the Strasbourg Court<sup>79</sup> observed that

“the use of the adjective [flagrant] is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of article 6 if occurring within the contracting state itself... what the word ‘flagrant’ is intended to convey is a breach of the principles of fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article.”<sup>80</sup>

Similarly, in *Devaseelan v Secretary of State for the Home Department*, the United Kingdom Immigration and Appeals Tribunal considered that the removal of an individual would lead to a flagrant denial of justice in the receiving state where Article 6(1) rights “will be completely denied or nullified in the destination country – that it can be said that removal will breach the treaty obligations of the signatory State however those obligations might be interpreted or whatever might be said by or on behalf of the destination State.”<sup>81</sup>

These passages indicate that the test for establishing a flagrant denial of justice in the receiving state is a rigorous one and that the court has limited discretion when deciding whether expelling the individual to the receiving state would violate his Article 6(1) rights. To put it another way, in these cases the conception of (in)justice in the receiving state is very tightly defined. Indeed, there appears to have been only one reported case where an individual’s deportation from a signatory state to a receiving state would have led to the signatory state being in breach of its Article 6(1) obligations. That case was *Othman v United*

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<sup>79</sup> The “Strasbourg Court” is used as shorthand when referring to the European Court of Human Rights.

<sup>80</sup> *Mamatkulov and Askarov* (2005) 41 E.H.R.R. 494 at [90]. This wording has subsequently been used in other cases: see, e.g., *Othman*, (2012) 55 E.H.R.R. 1 at [260].

<sup>81</sup> [2002] UKIAT 702; [2003] Imm. A.R. 1 at [111]. This conception of flagrant denial of justice has been adopted in subsequent decisions: see, e.g., *R. (Ullah)* [2004] UKHL 26; [2004] 2 A.C. 323, *R. (Razgar) v Secretary of State for the Home Department (No.2)* [2004] UKHL 27; [2004] 2 AC 368 and *E.M. (Lebanon)* [2008] UKHL 64; [2009] 1 A.C. 1198.

*Kingdom*,<sup>82</sup> which concerned the deportation of Abu Qatada, a controversial Muslim cleric, from the United Kingdom to Jordan. The Strasbourg Court held that Abu Qatada's removal to Jordan for trial in that country would breach his Article 6(1) rights because some of the evidence that was likely to be used in a prosecution against him had been extracted through the torture of third parties in Jordan. In *Othman*, the Strasbourg Court also outlined a number of examples from the case law which highlighted the narrow scope of "flagrant denial of justice". These examples included

"conviction *in absentia* with no possibility subsequently to obtain a fresh determination of the merits of the charge;<sup>83</sup> a trial which is summary in nature and conducted with a total disregard for the rights of the defence;<sup>84</sup> detention without any access to an independent and impartial tribunal to have the legality the detention reviewed;<sup>85</sup> and deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country."<sup>86,87</sup>

This list of examples is not exhaustive. Yet, it shows that, in expulsion cases, what amounts to injustice in the receiving state has a much narrower scope than is the case under *Spiliada*'s second limb. In so far as the expulsion cases are concerned, injustice in the receiving state means very serious procedural unfairness which would almost completely deny the individual's Article 6(1) rights in that forum. However, in relation to *Spiliada*'s second limb,

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<sup>82</sup> (2012) 55 E.H.R.R. 1.

<sup>83</sup> *Einhorn* Reports of Judgments and Decisions 2001-XI at [33] and *Stoichkov v Bulgaria* (2007) 44 E.H.R.R. 14 at [56].

<sup>84</sup> *Bader v Sweden* (2008) 46 E.H.R.R. 13 at [47].

<sup>85</sup> *Al-Moayad v Germany* (Application No.35865/03) (2007) 44 E.H.R.R. SE22 at [101].

<sup>86</sup> *Al-Moayad v Germany* (Application No.35865/03) (2007) 44 E.H.R.R. SE22 at [101].

<sup>87</sup> *Othman* (2012) 55 E.H.R.R. 1 at [259]. Abu Qatada was finally deported from the United Kingdom to Jordan on 7 July 2013, following an agreement between the two governments. Based on the agreement, the Jordanian government undertook that evidence obtained against Abu Qatada through torture would not be used in any future hearing that he would be subjected to in Jordan.

as was discussed earlier, injustice covers a far wider range of potential shortcomings in the more closely connected forum.<sup>88</sup>

The more limited conception of (in)justice in expulsion cases is rationalised “against the background of the general principle of international law that states have the right to control the entry, residence and expulsion of aliens.”<sup>89</sup> While, no doubt, it would be problematic to replace this notion of (in)justice with that underpinning the application of *Spiliada*’s second limb, there is no reason in principle or policy as to why the reverse of this transplantation would be illegitimate. Indeed, the disproportionately broad conception of (in)justice for the purposes of *Spiliada*’s second limb suggests that the English court is more protective of a claimant’s case (in a *forum (non) conveniens* case) than it is of an *individual* (in an expulsion case). If a foreign legal system is good enough to receive an individual, then it is surely good enough to entertain an individual’s case. Accordingly, it is argued that it would be appropriate for the notion of (in)justice under *Spiliada*’s second limb to be remodelled on the basis of the definition for justice in the receiving state, as outlined in Article 6 expulsion cases.

### **3. The Refined *Spiliada* Test and its Application**

The foregoing argument suggests that the *Spiliada* doctrine should continue to be applied in two stages, but that the reformulated second stage should take as its inspiration the test from Article 6(1) of the E.C.H.R. (as applied in expulsion cases). Such reform would lead to the following position: to obtain a stay of proceedings commenced in England as of right, first, the burden is on the defendant to show – relying on the factors that are currently used under the first limb of *Spiliada* – that another foreign state is the dispute’s centre of gravity and its

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<sup>88</sup> See also, J.J. Fawcett, “The Impact of Article 6(1) of the ECHR on Private International Law” (2007) 56 I.C.L.Q. 1 at 38-39.

<sup>89</sup> Lord Hope of Craighead in *E.M. (Lebanon)* [2008] UKHL 64; [2009] 1 A.C. 1198 at 1208.

courts have jurisdiction to entertain it. If this burden is not discharged, then the stay application would be rejected and the case would be heard by the English court. If, however, the English court is satisfied that there is an available forum which is more closely connected with the dispute than England, it should stay the proceedings, unless the claimant can show that sending the dispute to its centre of gravity would lead to a violation of his Article 6(1) rights in that forum (as defined in the expulsion cases). As regards service-out cases, and in light of what now appears to be the settled position under English law following the decisions in *Cherney* and *Altimo Holdings*, the English court should only give permission for service out if England is the forum most closely connected to the dispute or, failing that, if the claimant can show that he would suffer a breach of his Article 6(1) rights (as defined in the expulsion cases) in the event that the dispute were to be tried in the more closely connected forum. In short, in both service-out and as-of-right proceedings, if for all intents and purposes, the action belongs to another available foreign forum, the English court should only exercise jurisdiction over it if the United Kingdom would otherwise be in breach of its E.C.H.R. obligations, by virtue of the violation in the dispute's centre of gravity of the claimant's Article 6(1) rights (as defined in expulsion cases).

This new doctrinal framework, it is argued, represents the more appropriate middle ground that can be realistically achieved between the polarised options of completely discarding the court's discretion under *Spiliada*'s second limb and maintaining the current problematic status quo. On one level, the new doctrinal model would prevent a situation from arising where staying the proceedings in England (or rejecting a service-out application) would lead to the claimant being subjected to the most extreme forms of injustice in the more closely connected forum. As stated earlier, without the discretion under *Spiliada*'s second limb, disputes like the ones in *Oppenheimer v Louis Rosenthal*, *Ellinger v Guinness*, *Mahon & Co*, *Carvalho v Hull Blyth (Angola) Ltd* and *Alberta Inc v Katanga Mining Ltd* would not

be decided the same way because none of those disputes had any connection with England. It is, however, patently clear that, in these types of case, the claimant would be subjected to profound injustice if he had to litigate his claim in the dispute's centre of gravity. Indeed, had any of these been an expulsion case, deporting the individual to the receiving forum would have clearly put the United Kingdom Government in breach of its Article 6(1) obligations. Accordingly, the application of the new test would allow the English court to assume jurisdiction over the dispute, in the sort of factual contexts exemplified in these cases, even though the connection between England and the parties' claims was tenuous (or, indeed, non-existent).

On another level, the new doctrinal basis would clearly provide a more tightly-defined scope for the application of the court's discretion under *Spiliada*'s second limb than is presently the case. As indicated earlier, in the context of deportation proceedings, the conception of (in)justice in the receiving state to an individual involved in those proceedings has a narrow ambit. If that notion of (in)justice replaces the one currently under *Spiliada*'s second limb, it would become more difficult for a claimant to convince the court to depart from the provisional conclusion reached under the doctrine's first limb. Indeed, it is unlikely whether any of the cases mentioned above in which the court had decided to exercise jurisdiction over the claim despite lack of any meaningful connection with England – namely, *Cherney*, *Altimo Holdings* and *Lubbe* – would be decided the same way. *Cherney* was certainly not a case like *Carvalho*, for instance, where it was virtually clear that, because of the political upheaval following the Angolan independence, the plaintiff had become “the sort of person who would be anathema to the present government in Angola.”<sup>90</sup> In *Cherney*, the claimant's extensive submissions highlighted various problems that would arise if his case were to be litigated in Russia. They did not, however, establish that his Article 6(1) rights

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<sup>90</sup> Geoffrey Lane L.J. in *Carvalho v Hull Blyth (Angola) Ltd* [1979] 1 W.L.R. 1228 at 1241.

would be completely nullified (as defined in expulsion cases) if his claim were not to be litigated in England.<sup>91</sup> In other words, if *Cherney* had been an expulsion case, it is highly unlikely that the United Kingdom Government would have been in breach of its Article 6(1) obligations, if it were to deport Cherney to Russia. Likewise, in *Altimo Holdings*, despite all its assertions, the claimant did not establish that it was the type of litigant so disliked and prejudiced against by the relevant Kyrgyz authorities that the very essence of its Article 6(1) rights would have been violated if its dispute were to be litigated in Kyrgyzstan. Indeed, in that case, the claimant's attack at the Kyrgyz court's integrity came before that court had even had the opportunity to consider the case.<sup>92</sup> It is, therefore, highly unlikely that, in a case like *Altimo Holdings*, the trial in Kyrgyzstan would amount to a violation of the claimant's Article 6(1) rights, as defined in expulsion cases. It is also improbable that arguments about the lack of resources and experience in the most closely connected forum, in cases like *Lubbe* (and *Connelly*), would be sufficient to satisfy the proposed discretionary basis under *Spiliada*'s second limb. It was not conceded in either of these cases that no financial assistance would be available in Namibia (in *Connelly*) or in South Africa (in *Lubbe*) to allow the plaintiffs to bring their claims and that the only route available to them was for them to litigate their complicated case in person.<sup>93</sup> Instead, in each case there were strong arguments highlighting the availability of financial resources and legal expertise in Namibia and South Africa. The fact that such expertise or means existed in those forums (albeit contested by the plaintiffs) meant that it was not a case where sending the plaintiffs to the dispute's centre of gravity would lead to a breach of their Article 6(1) rights (as defined in expulsion cases).

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<sup>91</sup> Professor Briggs was also sceptical about the persuasiveness of the claimant's arguments concerning the integrity of the Russian legal system: A. Briggs, "*Forum non satis*: finding fault with a foreign court" (2009) 80 B.Y.I.L. 575 at 578.

<sup>92</sup> See, also, A. Briggs, "*Forum Non Satis: Spiliada* and an Inconvenient Truth" [2011] L.M.C.L.Q. 329 at 332.

<sup>93</sup> See *Airey v Ireland* (Series A, No. 32) (1979-80) 2 E.H.R.R. 305 where the Irish Government conceded that legal aid was not available to a woman who was involved in divorce proceedings.

In the long run, this proposed change in the law could mitigate the problems identified with the application of the existing English *forum (non) conveniens* doctrine. As indicated earlier, the English court's discretion under *Spiliada*'s first limb has been applied fairly consistently. By limiting the court's room for manoeuvre under *Spiliada*'s second limb, there would be fewer instances where the English court would depart from its finding under the doctrine's first limb. Consequently, the proposed remodelling of *Spiliada* would render the English *forum (non) conveniens* doctrine more predictable. One other by-product of the tightening of the scope of justice under *Spiliada*'s second limb is that it would make legal proceedings more efficient. It would no longer be possible for claimants to rely on a virtually endless list of factors in challenging the ability of the court most closely connected to the dispute to do justice to their claims. Indeed, having a more narrowly-focused framework for applying the discretion could at least in certain (if not most) cases discourage claimants from seeking to trump the court's finding under the doctrine's first limb. The focus of the court and the parties would be on finding the forum which is most closely connected to the dispute. While there is no denying the fact that identifying that forum could require detailed evidential analysis, it would clearly be less resource-intensive than is currently the case. Lastly, the refinement of *Spiliada* in light of the proposed framework would make it a doctrine which is less chauvinistic and more tolerant of natural (and, indeed, inevitable) differences of approach in different legal systems. In short, therefore, the proposed formulation would represent an improvement on the current staying-of-proceedings and service-out regimes in England.

Of course, restating *Spiliada*'s second limb in line with the doctrinal framework suggested in this article would not be free from shortcomings. For example, there is no categorical definition for what amounts to a breach of Article 6(1) rights in expulsion cases. Hence, there will still be scope for problems with the application of the doctrine's second



limb. Nevertheless, on balance, it is argued that the proposed approach would be a step in the right direction in mitigating the problems that have emerged from the application of the second limb of the existing *Spiliada* doctrine.

## F. CONCLUSION

In *MacShannon v Rockware Glass Ltd*, not long after the law's transformation from the *St Pierre* test to the modern-day *forum (non) conveniens* doctrine had begun, Lord Diplock observed that the approach to the discretionary staying of proceedings in England "must manifest a reasonable consistency as between one case and another" and that its exercise "ought to be predictable, so that lawyers may know broadly what advice to give to their clients".<sup>94</sup> However, as the discussion in this article has sought to illustrate, the position under the *Spiliada* test falls far short of Lord Diplock's desired position. What is more, the doctrine's application has led to lengthy and expensive proceedings and judicial chauvinism.

This article has tried to highlight that these problems have stemmed largely from the court's disproportionately wide discretion under the doctrine's second limb. It has argued that, both pragmatically and theoretically, there is a pressing need to improve on the status quo. In this respect, the article has claimed that the most prudent course of action is to refine the *Spiliada* doctrine with a view to limiting (rather than completely abolishing) the court's discretion at the second stage. In particular, its basic thesis has been that the court's discretion under the doctrine's second limb should be redefined in line with the doctrinal framework underpinning the protection a person's right to a fair trial under Article 6(1) of the E.C.H.R. (as applied in expulsion cases).

Accordingly, under the proposed restatement of the English *forum (non) conveniens* doctrine, the English court's predominant (albeit not sole) concern would be to find the

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<sup>94</sup> [1978] AC 795 at 813.

dispute's centre of gravity. In both cases concerning service-out applications or staying of proceedings brought as of right, as a starting position, the English court should not exercise jurisdiction over a dispute which has been shown to be most closely connected to another available foreign forum. That position should be only departed from where the claimant can establish that sending the matter to its centre of gravity would render the United Kingdom in breach of its E.C.H.R. obligations, by virtue of the violation in that forum of the claimant's Article 6(1) rights (as defined in expulsion cases).